BEFORE THE WASHINGTON STATE
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of the Application regarding the Conversion and Acquisition of Control of Premera Blue Cross and its Affiliates, Washington Citizen Action, Welfare Rights Organizing Coalition, American Lung Association of Washington, Northwest Federation of Community Organizations, Northwest Health Law Advocates, Service Employees International Union Washington State Council, The Children's Alliance, Washington Academy of Family Physicians, Washington Association of Churches, Washington Protection and Advocacy System and Washington State NOW, Washington State Medical Association, Washington State Hospital Association, and Association of Washington State Public Hospital Districts Applicants for Intervention.	No. G02-45 APPLICANT-INTERVENORS' JOINT RESPONSE TO PREMERA'S MOTION FOR PARTIAL RECONSIDERATION AND CLARIFICATION

I. INTRODUCTION

The above named Applicant-Intervenors, which are affected consumer, advocacy, citizen and provider organizations, submit this joint response to Premera's Motion for Partial Reconsideration and Clarification. While the Insurance Commissioner has not yet ruled on the

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Applicant-Interventors' Motions for Intervention, the objections raised in Premera's Motion, if sustained, would dramatically impair the ability of the Applicant-Intervenors to participate fully in the administrative proceeding, as envisioned by the Washington State Holding Company Acts. Given the informal nature of the adjudicative proceeding before the Insurance Commissioner, WAC 284-02-070(2)(b), the Applicant-Intervenors request consideration of this Response.

Applicant-Intervenors urge the Insurance Commissioner to reject Premera's Objection to the First Case Management Order. The Insurance Commissioner has acted consistently with the plain language and clear requirements of the Washington State Holding Company Acts by establishing that Premera's Application for conversion would not be considered complete until after the adjudicative hearing and the closing of the administrative record.[1]

The Insurance Commissioner should, in full conformity with governing statutes, continue to take a measured approach to this huge proposed transaction that will impact millions of Washington health care consumers. There is no need to rush to judgment, and the Insurance Commissioner should decline even to agree to Premera's proposed date certain (March 1, 2003) for a final decision in this matter. Instead, as is required by law, the Insurance Commissioner should get all pertinent information, including information presented at a hearing to be convened at a reasonable time, and make a decision within 60 days of the close of the adjudicative hearing.

II. STATEMENT OF FACTS

On October 14, 2002, the Applicant-Intervenors filed their Motions for Intervention, seeking to intervene in the administrative proceeding before the Insurance Commissioner regarding the conversion of Premera Blue Cross. Applicant-Intervenors are all organizations

[1] For purposes of this response, applicant-intervenors recognize that the Office of the Insurance Commissioner and the Attorney General's Office are proceeding under RCW 48.31C; 48.31B but reserve the right to object at a later date that the Acts do not permit conversions of the type at issue here.

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whose members or constituents include subscribers, enrollees, contract holders, providers and creditors of Premera Blue Cross as well as beneficiaries of the nonprofit assets held by Premera Blue Cross.

Applicant-Intervenors are concerned about the dramatic health impact the proposed conversion will have on their constituencies, and seek intervention in order to ensure that their concerns are fully explored, documented, and considered as part of the conversion process, and that their members' significant interests are protected. The Applicant-Intervenors seek intervention, in part, to have access to necessary data in order to analyze the impact of the proposed conversion on the Washington state health system, among other serious concerns.

On October 24, 2002, the Insurance Commissioner issued the First Order: Case Management Order [hereinafter "First Case Management Order"], which describes the process and timelines for parties seeking intervenor status in the proceeding. First Case Management Order at 4-6. The First Case Management Order also determines that Premera's application to convert to for-profit status under Chapters 48.31B and 48.31C RCW will not be deemed complete until all the necessary information required by the Insurance Commissioner is provided, including information provided as part of the adjudicative hearing process under RCW 48.31B.015(4) and 070; 48.31C.030(4) and 140; Id. at 2.

On November 1, 2002, Premera Blue Cross filed its Motion for Partial Reconsideration and Clarification [hereinafter " Premera Objection"], under the provision for objections described in the First Case Management Order. Id. at 8. Premera asserted in its Objection that the timeframes established in the First Case Management Order were not consistent with the statute, and that the Insurance Commissioner had exceeded his authority when he ordered that the information obtained from Premera as part of the administrative hearing process be part of

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the "statement" from the company required under chapters 48.31B and 48.31C RCW. Premera Objection at 2-3.

Premera argued that once it filed what it believed fulfilled the minimal documentary requirements for a "Form A" filing, its conversion application was complete. Premera asserted that the Commissioner must render a decision on the propriety of the conversion within 60 days thereafter, regardless of the Commissioner's determination that additional information was necessary and regardless of how much time the adjudicative proceeding might require. See Premera Objection at 8. Accordingly, Premera seeks a change in the First Case Management Order so that the Insurance Commissioner orders that the entire discovery, hearing, and deliberation process concludes within 60 days of the completion of the filing, which Premera argued occurred on October 25, 2002.[2] See Premera Objection at 2, 11-12.

On November 13, 2002, the Insurance Commissioner issued his Second Order: Order of Status Conference [hereinafter "Second Case Management Order"] in which he permitted the Office of the Insurance Commissioner [OIC] staff to submit a response to Premera's Objection on November 22, 2002.

III. ARGUMENT

A. Premera's filing under the Holding Company Acts will not be complete until the end of the adjudicative hearing.

The statutory sections relied upon by Premera do not bind the Insurance Commissioner to a 60-day decision period from when Premera deems its application complete. Instead, both the

[2] Premera's Objection was accompanied by a cover letter from Yori Milo, Executive Vice President and Chief Legal and Public Policy Officer, and John P. Domeika, Senior Vice President and General Counsel for Premera to Deputy Insurance Commissioner James T. Odiorne proposing an agreement to extend any timelines for review of the conversion to March 1, 2003. Declaration of Eleanor Hamburger, at Exhibit 1. However, since, as shown below, the Commissioner must determine when a filing is complete and thus when the 60-day period for decision-making starts to run, the Commissioner should not agree to any date certain for a final decision.

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Insurer Holding Company Act, and the Holding Company Act for Health Care Services Contractors and Health Maintenance Organizations, clearly provide that the Insurance Commissioner determines when a statement filed under the Acts is complete, and that when a hearing is held, the review is complete only at the close of the hearing.

RCW 48.312C.030(4) explicitly leaves it to the discretion of the Commissioner to determine when the application is complete, and requires that if the Commissioner orders a hearing, the 60-day period for decision starts at the end of the hearing:

> The commissioner shall approve an exchange or other acquisition of control referred to in this section within 60 days after he or she declares the statement filed under this section to be complete and if a hearing is requested by the commissioner or either party to the transaction, after holding a public hearing.

(Emphasis added.) RCW 48.31B.015 says essentially the same thing:

> The commissioner shall approve an exchange or other acquisition of control referred to in this section within sixty days after he or she declares the statement filed under this section to be complete and after holding a public hearing.

(Emphasis added.)

These provisions plainly mean that the Commissioner must make a decision no later than 60 days after the Commissioner determines the statement to be complete, or 60 days after a hearing duly convened, whichever is later. Thus, if an adjudicative hearing is scheduled, the Commissioner must rule within sixty days after both conditions set forth in the statute are fulfilled – the declaration that the statement is complete AND the holding of a public hearing. If no adjudicative hearing is requested, the Commissioner must rule on the transaction within 60 days after the Commissioner declares that the statement is complete.

"A statute that is plain on its face is not subject to construction." In re Detention of Brock, 99 Wn. App. 722, 724, 995 P.2d 111, 112 (2000). Since the statute setting the deadline

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for the Commissioner's ruling establishes as conditions precedent both the declaration of the completion of the filing and the holding of the hearing, both conditions must be met before the 60 day time-limit begins.

But even if the language of the statute was viewed as in any way unclear, this interpretation is also supported by the rules of statutory construction. Premera argues that the statute should be interpreted to require the Commissioner to render his decision within 60 days of the completion of the filing of the statement, regardless of whether an adjudicative hearing is held. Premera Objection at 6, 7, 8. If this were correct, there would be no reason to refer to the holding of such a hearing in this provision of the statute at all, and certainly no reason to say that the decision must be rendered "after" the hearing. "Whenever possible, courts should avoid a statutory construction which nullifies, voids, or renders meaningless or superfluous any section or words." Nisqually Delta Ass'n v. City of DuPont, 95 Wn.2d 563, 568, 627 P.2d 956, 959 (1981); State ex rel. Gallwey v. Grimm, 146 Wn.2d 445, 464, 48 P.3d 274, 283 (2002).

Since Premera's proffered construction would render meaningless RCW 48.31C.030(4)'s reference to "after" the adjudicative hearings in the sentence establishing the 60-day decision period, it must be rejected. Statutes must be construed "to give effect to all the language used." City of Kent v. Lamb, 1 Wn. App. 737, 740, 463 P.2d 661, 663 (1969). In order to give effect to both RCW 48.31C.030(4)'s language referring to the completion of the filing of the statement and its language referring to the holding of the public hearing, both must be interpreted as conditions precedent to the commencement of the 60 day time-limit.[3]

[3] Clearly, the Commissioner may not delay the review of Premera's application indefinitely. Premera Objection at 10. However, this has not occurred. The Commissioner has explicitly exercised his statutory right to hold a public hearing on Premera's application to convert for for-profit status (RCW 48.31B.070; 48.31C.030, 140) and has issued a First Case Management Order setting deadlines and procedures for the conduct of such a hearing as permitted by various provisions the Administrative Procedures Act (RCW 34.05.434, 437, 446 and 449). See First Case Management Order at 2, 3.

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Under these statutes, the entity seeking the "exchange or other acquisition of control" does not determine when the statement is complete. Thus, Premera's claim that it has filed all the "exhibits, documents and other information identified by the OIC as necessary to complete the Form A requirements under the Holding Company Acts," Premera Objection at 4, does not trigger any time period under relevant statutes. What matters is when the Commissioner, not the entity, determines the statement to be complete.

Premera correctly points out that the statement is deemed complete 60 days after the entity files its material unless the Commissioner within that period "declares the statement to be incomplete and requests additional information…" RCW 48.13C.030(4). The Commissioner, however, has timely declared the statement to be incomplete: In the First Case Management Order at 2, the Insurance Commissioner determined that the filing was not complete, and asked for further documentation.

Most importantly, the Commissioner found that "[t]he Application will not be considered complete until the adjudicative hearing has concluded and the administrative record is closed." This is fully consistent with the statutory language quoted and highlighted above. Indeed, the Commissioner would not have been following the plain wording of the statute had he failed to declare that the decision period starts "after" the hearing.

Premera's own judgment of the completeness of its filing cannot be substituted for the judgment of the Insurance Commissioner. See Federated American Ins. Co. v. Marquardt, 108 Wn.2d 651, 658, 741 P.2d 18, 22 (1987) ("Words in a statute are to be given their plain and ordinary meaning unless a contrary intent appears."). There is simply no basis for Premera's suggestion that the 60-day period for decision has started to run or will start to run whenever Premera says it should.

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B. The filing is complete only upon fulfillment of the statutory and regulatory conditions for completeness, not when the entity asserts completeness.

Premera misconstrues the statutory requirements for what constitutes a complete statement under the Holding Company Acts. Premera implies that a statement, under the Holding Company Acts, includes only the specific information described in RCW 48.31B.015 (2)(a)-(k) and RCW 48.31C.030 (2)(a)-(k), and does not include "such additional information as the Commissioner may prescribe by rule as necessary or appropriate for the protection of subscribers of the health carrier or in the public interest." RCW 48.31B.015(2)(l); RCW 48.31C.030(2)(l).

Both statutes state without exception that "the statement to be filed with the commissioner under this section . . . *must contain the following information*" and then define the required contents in subsections labeled (a) through (l). RCW 48.31B.015(2); 48.31C.030(2). Nothing in these provisions limits the Insurance Commissioner's broad powers to demand additional necessary information in order to conduct a thorough investigation of the Premera application to convert.

Premera also incorrectly claims that the regulations implementing the Holding Company Acts affirmatively preclude an interpretation of the statute that would permit the Insurance Commissioner to determine that the administrative record and other information developed at the adjudicative hearing is part of the required "statement." See Premera Objection at 8. Contrary to Premera's assertion, neither WAC 284-18-300 nor 284-18A-300 mentions any deadline for the Commissioner's ruling on the transaction nor imposes any limit on the broad power of the Insurance Commissioner to seek necessary information.

The regulations explicitly state that the Form A, and other required filings, are mere "guides" for the preparation of the required application. WAC 284-18A-300; 284-18-300. The

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regulations anticipate that further additional material information, beyond the Form A filing, may be necessary. WAC 284-18A-330; 284-18-330. Moreover, the cases cited by Premera in support of its regulatory argument not only make no reference to the Insurance Commissioner's regulations implementing the Holding Company Acts, but were decided based upon very different legal frameworks.[4]

C. Premera's Arguments Regarding the Time Limits Are Not Persuasive.

In support of its construction of the Acts, Premera offers two vaguely articulated arguments. First, Premera asserts that the Holding Company Acts requires a single 60-day process that it claims the First Case Management Order violates. Premera Objection at 7-10. This argument fails because Premera misconstrues the plain language of the Holding Company Acts which contains two separate 60 day periods: one by which the Insurance Commissioner must either declare the filing to be complete or request additional information; and the second by which the Commissioner must complete his administrative review after he deems the record complete. RCW 48.31C.030(4).

As shown above, the timeframe for determining the completeness of the Premera filing has not run, and the Commissioner has fulfilled his obligation under the law to promptly notify Premera that additional information is required by the issuance of the First Case Management

[4] The cases cited by Premera (Norco Construction Inc. v. King County, 97 Wn.2d 680, 649 P.2d 103 (1982) and Mission Springs v. Spokane, 134 Wn.2d 947, 954 P.2d 250 (1998)) are cases concerning the rights of landowners to obtain building or grading permits from local governments and are based upon the relevant zoning and permitting regulations and upon the Washington land use case law regarding the rights of landowners. Nothing in these cases refers to the regulation of insurance, under which the rights of nonprofit health carriers are decidedly different from that of landowners. See RCW 48.01.030; Kueckelhan v. Federal Old Line Ins. Co., 69 Wn.2d 392, 418 P.2d 443 (1966).

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Order.[5] Premera's purported interpretation of the purpose of the "deemed complete" rule is not compelled by the language of the statutes; in fact, it is contrary to their plain language.[6]

Second, Premera vaguely implies that the First Case Management Order's application of RCW 48.31C.030(4) could violate the Dormant Commerce Clause.[7] Without so stating, this appears to be an appeal to the principle that, if possible, statutes should be construed to preserve their constitutionality. Seattle v. Montana, 129 Wn.2d 583, 590, 919 P.2d 1218, 1221 (1996). By implication, if the Commissioner's interpretation of RCW 48.31C.030(4) violates the Dormant Commerce Clause and Premera's doesn't, the latter should be adopted. However, Premera fails to perform the analysis required to determine whether the Holding Company Acts, as applied in the First Case Management Order, violate the Dormant Commerce Clause (see, e.g. State v. Heckel, 148 Wn.2d 824, 832-33, 24 P.3d 404 (2001) (laying out the required analysis)), or even to articulate generally how this constitutional provision might be implicated by the statutory interpretation in question. It is not surprising that Premera did not conduct the analysis, because it would stretch credulity to suggest directly that a state insurance

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[5] The only authority that Premera cites in support of its argument that the "deemed complete" rule is violated is a California case that applies only to the specific purpose of the particular California statute at issue in that case, rather than a broad purpose animating all administrative "application" processes. Riverwatch v. County of San Diego, 91 Cal. Rptr.2d 322, 328, 76 Cal. App. 4th 1428, 1438 (1999)("The goal of the act is to relieve permit applicants from protracted and unjustified delays in processing their permit applications. (Bickel v. City of Piedmont (1997) 16 Cal. 4th 1040, 1046, 68 Cal.Rptr.2d 758, 946 P.2d 427).")

[6] The more obvious interpretation is that the "deemed complete" provision serves the dual role of: 1) explicitly giving the Commissioner a significant period of time to assess only whether there are any additional materials necessary for the Commissioner to make his statutorily required judgment and 2) ensuring that the transaction will not be stalled should the Commissioner simply fail to address whether additional information is necessary for completion of the statement.

[7] The Commerce Clause grants Congress the "power ... [t]o regulate commerce with foreign nations, and among the several states." U.S. Const. art. I, § 8, cl. 3. Implicit in this affirmative grant is the negative or "dormant" Commerce Clause, the principle that the states impermissibly intrude on this federal power when they enact laws that unduly burden interstate commerce.' See Franks & Son, Inc. v. State, 136 Wn.2d 737, 747, 966 P.2d 1232, 1237 (1998)." State v. Heckel, 148 Wn.2d. 824, 832, 24 P.3d 404, 409 (2001).

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commissioner is unduly burdening interstate commerce by taking a few months to determine the propriety of a potentially multi-billion dollar health insurance conversion.

D. Premera's position that the Insurance Commissioner must render a decision on its application to convert within 60 days of its October 25, 2002 filing would prevent all meaningful involvement by parties with a "significant interest."

Premera seeks a change in the First Case Management Order that would force the Insurance Commissioner to conduct the complete review process under the Holding Company Acts, including adequate discovery and an administrative hearing, by December 23, 2002. See Premera Objection at 12. Premera's Objection, if granted, would severely limit the involvement of the Applicant-Intervenors and their ability to participate meaningfully in the preparation for and conduct of the administrative proceeding.

The Legislature clearly intended to allow full participation by persons with "significant interest" in the administrative proceedings under the Holding Company Acts. The statutes provide for Intervenors to be allowed to "…conduct discovery proceeding in the same manner as is allowed in the superior court of this state" as well as the opportunity to present and cross-examine witnesses and offer written and oral argument. RCW 48.31C.030(4); 48.31B.015(4)(b).

Superior Court rules permit broad discovery rights, which cannot be meaningfully exercised within 60 days from the initial filing. See CR 26-37. Under Premera's interpretation, there would not be enough time for Intervenors to obtain the filing, intervene, engage in adequate discovery, retain their own experts, and prepare and participate in an administrative hearing before the 60-day time-limit ran.

Premera's position would render all involvement by persons with "significant interest" meaningless, and without due process. Cf. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L.Ed.2d 18 (1976) (setting out three part balancing test to determine if an

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individual's due process rights are violated in civil contexts); CPC Fairfax v. T.B., 129 Wn.2d 439, 452-53, 918 P.2d 497, 504 (1996) (deprivation of statutory due process rights can amount to a constitutional due process violation). As it would be impossible for persons with significant interests to adequately participate in an administrative if Premera's position were adopted, that interpretation should be rejected as contrary to the clear intent of the Legislature.

Given Premera's offer to agree to a timeframe that would conclude by March 1, 2003, it appears that Premera really seeks a specific deadline for the conclusion of the conversion process, and perhaps other aspects of the administrative hearing process. See Declaration of Eleanor Hamburger, Exhibit 1, and Premera Objection at 3. The Commissioner, however, should not agree to a date certain for completion of the process. Any such agreement could improperly limit the legitimate information and discovery that the OIC and Intervenors are able to obtain and present.

Moreover, a conclusion of the process by a date certain could encourage Premera to withhold access by the OIC and Intervenors to necessary information, forcing a rushed determination reached without access to all necessary information. Due to the substantial public interest at stake in the proposed conversion, Premera should not be permitted to use such tactics to force a rush to judgment before all the necessary information is obtained. The proceedings should move forward at a reasonable pace and not be unduly delayed, but the establishment of a date certain for completion is neither required by statute, nor in the public interest.

IV. CONCLUSION

The Applicant-Intervenors urge the rejection of Premera's proposed modification of the First Case Management Order. The Insurance Commissioner's broad powers to obtain information determined to be necessary to complete the Premera application to convert to for-

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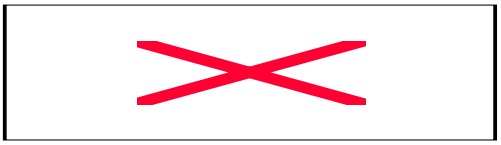
profit status should be upheld. The review process should not be rushed in any manner that effects the rights and abilities of both the OIC and those granted Intervention status to adequately participate in the adjudicative hearing, as provided in the Holding Company Acts.

Dated this __ day of November, 2002.

Respectfully submitted by:



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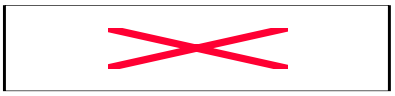

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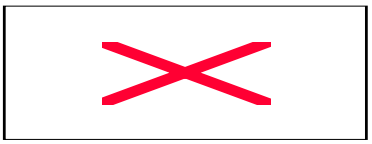

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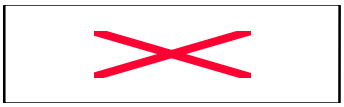

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